SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 2 1970
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 352

JOHN W. CONNELLY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES R. GREENFIELD, ESQ.,
900 Chapel Street,
New Haven, Connecticut 06510

THE MACK CO., NORTH HAVEN, CONN.

INDEX

STATEMENT OF JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF CASE 4

STATEMENT OF FACTS 6

REASONS FOR GRANTING THE WRIT 10

I. The United States Court of Appeals for the Second Circuit Erred in Failing to Grant Defendant Connelly a New Trial on the Substantive Counts After Reversing his Conviction on the Conspiracy Count of the One-Count Indictment 10

II. The Trial Court Erred in Charging That if the Jury Found that Defendant Connelly had Possessed the Bonds, It Could Infer Therefrom that He Knew the Bonds were Stolen and That He had Transported them in Interstate Commerce 12

ADOPTION OF ISSUES RAISED BY AND REASONS ADVANCED FOR ISSUANCE OF WRIT ON BEHALF OF CODEFENDANT COPPOLA 14

CONCLUSION 15

TABLE OF CASES CITED

Eiswick vs. *United States*, 329 U.S. 211 (1946)	11, 15
Kotteakos vs. *United States*, 328 U.S. 750	12
Krulewitch vs. *United States*, 336 U.S. 440 (1948)	11
Leary vs. *United States*, 395 U.S. 6 (1969)	14, 15
Logan vs. *United States*, 144 U.S. 263 (1891)	11, 15
Looney vs. *Metropolitan Ry. Co.*, 200 U.S. 480 (1906)	14
Wong Sun vs. *United States*, 371 U.S. 471 (1962)	11
United States vs. *Ross*, 92 U.S. 281 (1875)	14

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JOHN W. CONNELLY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner John W. Connelly respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this Case on April 17, 1970.

The opinion of the Court of Appeals (Lumbard, Chief Judge and Friendly, Circuit Judge and Judd, District Judge) is thus far unreported, and is reprinted in its entirety in an appendix hereto. Petition for rehearing was denied without opinion. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals, subnom *United States* vs. *Gennaro J. Coppolu et al*, from which review is sought, was entered on April 17, 1970. A timely petition for rehearing was filed and was denied on June 4, 1970.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit err in failing to grant a new trial to defendant Connelly on the two substantive counts after reversing his conviction on the only conspiracy count remaining in the case?

2. Did the trial court err in charging that if the jury found that defendant Connelly had possessed the bonds, it could infer therefrom that he knew the bonds were stolen and that he had transported them in interestate commerce?

STATUTES INVOLVED

18 United States Code, Section 2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value

of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 United States Code Section 2315:

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $5,000 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

On March 28, 1967 a three count indictment was returned against the defendants charging (1) that the defendants transported stolen securities from New York to Bridgeport and Fairfield, Connecticut (18 U.S.C. Sec. 2314); (2) that the defendants received, concealed and pledged these securities (18 U.S.C. Sec. 2315); and (3) that the defendants, along with Anthony Testo, conspired to violate 18 U.S.C. Secs. 2314 and 2315. This was indictment No. 11932. (19-22)* On October 16, 1967 a one count indictment charging a conspiracy to violate 18 U.S.C. Sec. 2314 was returned against the defendants. This indictment, No. 12085, charged that the defendants conspired, along with Testo, to transport stolen securities out of the State of Connecticut. (23-24) On the government's motion the indictments were consolidated for trial.

---

* All page references are to the joint appendix; the page numbers are at the bottom of the page in the two volume appendix.

Pleas of not guilty were entered on all counts of both indictments and a trial to a judge and jury was held in New Haven, Connecticut on December 11, 1967, lasting through December 29, 1967. At the close of the evidence, the government moved that count three of the indictment No. 11932 be dismissed, and the motion was granted. (6) At the close of the taking of evidence Judge Timbers denied defendant Connelly's Motion for Judgment of Acquittal. (6) On December 29, 1967 the jury returned guilty verdicts on all counts as to both defendants. (6)

On January 29, 1968 Judge Timbers imposed the following sentences:

Coppola:

(#11932) 10 years imprisonment on Count 1, 10 years imprisonment on Count 2. Fined $10,000 on both counts, for a total of $20,000.

(#12085) 5 years imprisonment on Count 1, and a $10,000 fine. Sentences are to run concurrently.

Connelly:

(#11932) 5 years imprisonment on Count 1, 5 years imprisonment on Count 2. Fined $5,000 on both counts, for a total of $10,000.

(#12085) 5 years imprisonment on Count 1, and a $5,000 fine. Sentences are to run concurrently.

Timely notices of appeal were filed on behalf of both defendants and in an opinion of April 17, 1970 the United States Court of Appeals for the Second Circuit affirmed in part and reversed in part. The two counts in indictment number 11932 were affirmed, and the conviction on indictment number 12085 was reversed. Connelly's motion for rehearing was filed and denied without opinion on June 4, 1970.

STATEMENT OF FACTS

George Plave, head cashier at Newburger, Loeb & Co. in New York City (100) testified that on October 25, 1966 a clerk employed by the brokerage firm discovered the absence of a bond from the firm's vault. Thereafter, physical counts and the inventories of bonds conducted on October 26, 1966 and December 21, 1966 by the firm of Peet, Marvick and Mitchell showed a number of bonds to be missing. The last audit prior to discovery of the missing bonds was August 26, 1966, and at that time, no bonds were missing. (183)

Anthony Testo was the government's chief witness, and was named as a co-conspirator with the two defendants in the two indictments in this case, but was not named as a defendant. Testo owned three pharmacies in the Bridgeport and Fairfield area. (107) He testified that he had known Coppola for about fifteen years (108) and that about February 1, 1967, he met with Coppola. According to Testo, Coppola advised him that he, Coppola, could get Testo a loan. (109) Testo was a businessman badly in need of money for his drug stores. (109) About the first week in February Coppola made Testo a loan of $3,000. According to Testo, Coppola indicated he could get some stocks and bonds that could be used as collateral for a loan. (110)

After the original conversation concerning the bonds, and a call on February 10, Testo claimed that on or about February 20, 1967, Coppola came to one of his drug stores and gave him a slip of paper containing the list of bonds which would be available for use as collateral. (112-114)

Testo further claimed that he took the list to Mr. DePalma at the Connecticut National Bank. (121) On or about Feb-

ruary 23, 1967, according to Testo, Mr. Coppola came to his drug store and gave him an intermediate Bond of a $5,000 denomination and allegedly said he, Coppola, could get $45,000 more in bonds. (122) Testo pledged the bond as collateral at the Mechanics and Farmers Bank on or about February 24, 1967 and received $3,500 as a loan. The loan was obtained at the Fairfield Branch from Mr. McGrath. (131)

Thereafter, between February 24th and March 1st, 1967, Testo claimed to have had several telephone conversations with Coppola. (136, 140) Testo claimed to have met Coppola on February 27th and that he gave Coppola $1,000. (141-142) On March 1st, Testo met Coppola at the Howard Johnson's Parking Lot in Fairfield, Connecticut at about 5:00 in the afternoon. (148-149) At that time, Coppola was accompanied by the defendant, Connelly, and according to Testo, Coppola introduced Connelly as "my partner, John." (153)

Testo claimed that a discussion ensued, participated in by both Connelly and Coppola, relative to how much Testo would pay for the use of bonds to be furnished to him as collateral for loans. At that time, no agreement was reached as to the price which Testo would pay. (154) During the discussion, Testo was told that the bonds would come "from a friend down the line." (159)

Testo further claimed on that Thursday, March 2nd, he had another telephone conversation with Coppola at which time it was agreed to meet at Kallay's Restaurant off the Black Rock Turnpike in Fairfield. (164) According to Testo, in one of the two telephone conversations on March 2nd, he and Coppola agreed that he, Testo, would pay $6,000 for the use of the bonds to be delivered to him. (160) Testo further

claimed that in the afternoon of March 2nd, he and his driver, a Mr. Gulli, drove to Kallay's Restaurant and when they arrived, Testo got out of the car and went over to another automobile where Coppola and Connelly were waiting. Testo said that a discussion ensued relating to when he would receive bonds to take to the bank. He then claimed that Coppola got out of the car and went to make a telephone call to a "motel somewhere down the line" in order to arrange to obtain the bonds for delivery to Testo. (173)

The witness Gulli who had accompanied Testo to the parking lot and who remained in Testo's car, was parked near the telephone booth and he observed Coppola enter the booth to make the call. He was able to observe that Coppola dialed directly in making the phone call and did not require the services of an operator to complete his telephone call from the pay booth. (592-593)

Testo claimed to have talked with Coppola next by telephone on March 4th and again on March 6th and March 7th, 1967. (118) Testo claimed that in the March 7th telephone conversation, arrangements were made for a meeting at the Worden Avenue exit of the Connecticut Turnpike in Bridgeport, (180) and that later that morning, he did meet with Coppola and Connelly. (182) Testo claimed that at that meeting, Coppola handled him four $5,000 Bonds and on Wednesday, March 8th, Testo took four bonds of the total face value of $20,000 to the Mechanics and Farmers Bank in Fairfield and pledged them for a $14,000 loan. (185, 188)

Thereafter, Testo claimed to have met Connelly and Coppola at the driveway of his drug store and tendered a $6,000 check which was refused. He said that Coppola accompanied him into

the drug store and instructed him to cash the check so that the payment could be made in cash instead of by check. (198)

According to Testo's testimony, the following morning, Coppola came to his office to pick up the $6,000 in cash and also delivered three $10,000 Federal Intermediate Bonds. (204) Testo said he gave Coppola $6,000, though the amount turned out to be short. (207) Testo took the three Intermediate Bonds to the bank later that morning, and at that time, the banker, Mr. McGrath pointed out that the bonds had already matured. (208) McGrath offered to keep the bonds and to process their redemption but Testo refused to leave the bonds and requested their return. (209-211) Mr. McGrath returned two but kept one of the bonds and thereafter checked with the authorities. (213)

In the meantime, Testo returned to his drug store with the two bonds and he claimed that later in the afternoon Coppola came into the store about 1:00 p.m. Testo testified that the defendants wanted the matured bonds back. (219)

On March 9, 1967, after Testo had left the bank, he was contacted by agents of the F.B.I. and thereafter, in a telephone conversation with Coppola, arranged a meeting at the Mechanics and Farmers Bank for the next morning March 10th. (221)

Coppola, accompained by Connelly as a passenger in his car, drove into the parking lot of the Bank on March 10, 1967, where they were apprehended by agents of the F.B.I. (363) At the time of their arrest, a sealed envelope containing several bonds was found under Coppola's seat in the automobile. (363)

All of the bonds that were pledged to the bank and those bonds which were in the sealed envelope were identified as bonds which were missing from Newberger, Loeb & Company.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED IN FAILING TO GRANT DEFENDANT CONNELLY A NEW TRIAL ON THE SUBSTANTIVE COUNTS AFTER REVERSING HIS CONVICTION ON THE CONSPIRACY COUNT OF THE ONE-COUNT INDICTMENT.

At the conclusion of the testimony of the government's chief witness, Testo, the Assistant United States Attorney moved that the jury be instructed that all of the testimony of Testo be admitted against Connelly.

The Court did in fact rule, over objection, that there had been a sufficient showing to establish the existence of a conspiracy and participation in it by Connelly and Coppola, and that conversations or other acts testified to with respect to one defendant outside the presence of the other could be considered against each. The court referred to the conspiracy counts (332-334) in discussing the ruling because at that stage of the proceedings, the government was still pressing the third count of the indictment in case number 11932 as well as the one count conspiracy indictment in case number 12085.

All subsequent evidence was admitted against the defendant Connelly on the basis of that ruling.

As the record shows (610) the government withdrew the third count of the indictment in case number 11932 before the case went to the jury so that at the time of the charge, the only conspiracy count was in case number 12085, that charging a conspiracy to transport the bonds out of Connecticut.

Upon appeal to the United States Court of Appeals for the Second Circuit, the latter court reversed the conviction of the defendants on this only conspiracy count remaining in the case, thus removing the last peg upon which much of the evidence had been admitted at the trial against defendant Connelly on the substantive counts. Notwithstanding such reversal, the Circuit Court refused to grant him a new trial on the substantive counts.

This Court has consistently held, since *Logan* vs. *United States* (1891) 144 U.S. 263, 308-309, that only those acts and declarations of a co-conspirator which are done and made while the conspiracy is pending and in furtherance of its object are admissible against another co-conspirator.

The rule was reinforced in *Fiswick* vs. *United States* (1946) 329 U.S. 211, 217; *Krulewitch* vs. *United States* (1948) 336 U.S. 440; and *Wong Sun* vs. *United States* (1962), 371 U.S. 471, 490-491. A fortiori, where an alleged conspiracy is not made out at all for any time period, the acts and declarations of one defendant cannot be introduced against a co-defendant not present at the time.

The inclusion of this improper evidence against Connelly was so prejudicial as to require a reversal on all of the counts. The testimony relating to acts outside the presence of Connelly, the various telephone calls, the exchange of bonds and dis-

cussions of money in the drug store office when Connelly was not present, so thoroughly pervaded the entire theory and concept of the government's case as to taint all of the considerations and deliberations of the jury with respect to the guilt of Connelly on all of the counts. One cannot say that the verdict was not swayed by the jury's consideration of the evidence admitted on the basis of the alleged conspiracy. *Kotteakos* vs. *United States*, 328 U.S. 750, 764-765.

II.

THE TRIAL COURT ERRED IN CHARGING THAT IF THE JURY FOUND THAT DEFENDANT CONNELLY HAD POSSESSED THE BONDS, IT COULD INFER THEREFROM THAT HE KNEW THE BONDS WERE STOLEN AND THAT HE TRANSPORTED THEM IN INTERSTATE COMMERCE.

The first two counts of the indictment number 11932 charged the defendants with transporting the bonds from New York City. Not one bit of evidence was produced to prove any connection whatsoever with transporting bonds. The government's entire case relied on an inference to be drawn from the fact of possession.

1. The evidence adduced by the government and the testimony of the government's chief witness expressly and specifically precluded the drawing of such an inference. According to Testo, Coppola said he would get the bonds from a "friend down the line" and that the friend was staying in a motel down the line (230) and that he would get them from a friend who was *from* New York. According to Testo, Coppola then went to make a phone call to get the bonds; and the wit-

ness Gulli who was near the phone booth testified that it was not a long distance call. (589-592)

We submit that in the light of the evidence, it was improper to even permit the jury to speculate upon the possibility of inferring that by reason of possession the defendant Connelly had transported. The question should never have been given to them and the suggestion that they might draw an inference should never have been made. The proof was that the bonds were in fact in the possession of a third person in Connecticut, and while the proof might have been the basis for consideration of a conspiracy count, it could not possibly support the substantive one in question.

Connelly's only connection with the bonds occurred on two or possibly three occasions. According to Testo, Connelly was present when Coppola handed Testo the bonds at the Worden Avenue Exit meeting on March 7, 1967. (183) According to Testo on direct examination, Connelly was outside in the car when Coppola handed Testo three Intermediate Bonds at his store on March 9, 1967 (204) but later on cross-examination, he stated that Connelly was in the store when Testo received the bonds.

Finally, Connelly was a passenger in Coppola's car when they were apprehended by F.B.I. agents on March 10, 1967 and an envelope containing the bonds was found under Coppola's seat.

Yet from these facts the trial court permitted the jurors to infer that Connelly had transported the bonds from New York.

We respectfully submit that this is a perfect example of the piling of an inference upon an inference, which cannot be per-

mitted. Nor can the error be saved by introducing a claim of constructive possession or aiding and abetting.

The conclusion is untenable because to reach it on any theory it is necessary to start with an inference and to infer additional facts from that inference; and that is unreasonable. *Looney* vs. *Metropolitan Ry. Co.*, 200 U.S. 480, 488 (1906); *United States* vs. *Ross*, 92 U.S. 281 (1875).

In permitting the jury to presume the fact of transportation from possession alone under the circumstances of this case, the trial court violated the minimum standard set forth in *Leary* vs. *United States*, 395 U.S. 6 (1969), that a presumed fact must be more likely than not to flow from the proved fact. There is nothing obvious about bonds which have been stolen and then have been moved into another state to cause one to presume that a person having possession of such a bond probably knew that it had been stolen and had in fact transported it from another state. Far from being a reasonable inference, such a conclusion can better be classified as a far-fetched assumption unless supported by other facts. In leaving such an inference with the jury, the trial court committed reversible error.

ADOPTION OF ISSUES RAISED BY AND REASONS ADVANCED FOR ISSUANCE OF WRIT ON BEHALF OF CODEFENDANT COPPOLA

The petitioner hereby joins in any and all issues raised and questions presented by the codefendant Coppola in his Petition for Certiorari which has been filed.

CONCLUSION

1. Each of the issues presented herein poses important questions of federal criminal law which should be decided by this court.

2. The decision of the court below conflicts with this Court's mandate in *Logan* vs. *United States*, (1891), 144 U.S. 263, 308-309; *Fiswick* vs. *United States*, (1946), 329 U.S. 211, 217; and *Leary* vs. *United States*, (1969), 395 U.S. 6.

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket Nos. 33538-9 "*United States* vs. *Gennaro Coppola, et al*" and that the judgment of the court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 1st day of July, 1970.

John W. Connelly,
Petitioner,
By James R. Greenfield,
Attorney for Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 300 and 301 — September Term, 1969.

(Argued: January 5, 1970 Decided: April 17, 1970)

Docket Nos. 33538 and 33539

UNITED STATES OF AMERICA,

Appellee,

vs.

GENNARO J. COPPOLA AND JOHN W. CONNELLY,

Appellants.

Before:

LUMBARD, *Chief Judge*,

FRIENDLY, *Circuit Judge*, and JUDD, *District Judge*.*

Appeals from judgments of conviction for transporting and pledging stolen securities, and conspiracy in violation of 18 U.S.C. §§ 2314, 2315, and 371, entered on jury verdicts of guilty, in the United States District Court for the District of Connecticut, William T. Timbers, *Chief Judge*.

Affirmed in part and reversed in part.

---

*Sitting by designation.

LESLIE BYELAS, Assistant United States Attorney (Stewart H. Jones, United States Attorney for the District of Connecticut, on the brief), *for appellee.*

DAVID BROILES, New Haven, Connecticut (Howard Jacobs, on the brief), *for appellant Coppola.*

DONALD G. WALSH, New Haven, Connecticut (James R. Greenfield, on the brief), *for appellant Connelly.*

LUMBARD, *Chief Judge:*

Gennaro J. Coppola and John W. Connelly were tried pursuant to two indictments. The first, #11932, consisted of three counts: (1) transporting stolen securities into Connecticut in violation of 18 U.S.C. § 2314; (2) receiving, concealing and pledging stolen securities in violation of 18 U.S.C. § 2315; and (3) conspiring to do the above in violation of 18 U.S.C. § 371. The second indictment #12085, charged the appellants with one count of conspiracy to transport the stolen securities out of the State of Connecticut. At the close of the evidence, before the case was submitted to the jury, the conspiracy count of the first indictment was dismissed on motion of the government. The jury convicted the appellants on the two substantive counts of the first indictment and the conspiracy count of the second indictment. Coppola was sentenced to ten years and fined $10,000 on each of the substantive counts and five years and fined $10,000 on the conspiracy count; Connelly was sen-

tenced to five years and fined $5,000 on each substantive count and fined $5,000 on the conspiracy count, all sentences to run concurrently.

Appellants claim error by the trial judge in: (1) allowing the jury to infer transportation of the stolen securities from the fact of possession, and (2) permitting the jury to find that a conspiracy to transport the bonds out of Connecticut existed. We hold that the jury was properly instructed regarding the inference of transportation from the fact of possession. However, the evidence was insufficient for the jury to find that the appellants conspired to transport the securities out of Connecticut. We affirm the convictions under the first indictment, #11932, and reverse the conspiracy conviction under the second indictment, #12085.

The charges arose out of a series of events in February and March, 1967, centering around the efforts of Anthony Testo, named a co-conspirator but not a defendant, to save his failing drugstore business. Testo owned and operated four drugstores in the Bridgeport-Fairfield, Connecticut area and was deeply in debt. He had applied to the Small Business Administration for a loan but had received no response. Coppola, having loaned Testo $3,000 on February 1, was aware that Testo was in dire financial straits and offered to supply Testo with bonds that could be used as collateral for loans. Testo accepted the offer and on February 23, Coppola delivered a $5,000 Federal Intermediate Credit Banks Bond to Testo who took it to the Mechanics and Farmers Bank and pledged it for a loan of $3,500. He then gave Coppola $1,000 in cash for supplying the bond. Testo needed still more money and after several more meetings with Coppola, Coppola gave Testo additional bonds, consisting of a Dormitory Authority of New

York, bond, a Turnpike Authority of Kentucky bond, and two Commonwealth of Puerto Rico bonds.

Connelly was present on at least four occasions when Testo and Coppola met, often driving the car in which Coppola was riding. Coppola introduced Connelly to Testo as "my partner John."

The scheme came to an abrupt end when Testo attempted to pledge three matured Federal Intermediate bonds. The bank suggested he redeem the bonds at face value rather than pledge them as security for a loan of a lesser amount, but Testo refused and asked for all three bonds back. The bank returned two bonds but retained one as additional collateral for a previous loan. The matured bond which was retained was a $10,000 Consolidated Collateral Trust Debenture of the Twelve Federal Intermediate Credit Banks, issued under the authority of the Federal Farm Loan Act and redeemable at any Federal Intermediate Credit Bank, Federal Reserve Bank or Branch, or any agency as the Twelve Federal Intermediate Credit Banks may designate. Coppola, upon learning of the incident at the bank, told Testo that he should have retrieved all three of the bonds.

Its suspicions aroused, the bank checked the bonds and discovered that they had been stolen from the New York City investment house of Newburger, Loeb & Co. sometime between September and December, 1966. An official of the investment house testified that an audit on August 26, 1966, had disclosed no bonds missing, but audits on October 26, and December 21, 1966, did disclose some missing bonds. There was also testimony that one of the bonds in defendants' possession had been received by Newburger, Loeb & Co., on December 5, 1966.

When Testo returned to the bank on the afternoon of March 9 he was questioned by FBI Agent Clarence Smith, told the bonds were stolen, and allowed to return to his store. When Coppola called Testo that night and offered to supply additional bonds, Testo notified the FBI, and Coppola and Connelly were apprehended the next day when they arrived to meet Testo outside the bank.

The appellants argue that the jury should not have been allowed to infer that appellants transported the bonds from New York into Connecticut from the fact that they possessed the bonds. We do not agree. The jury may infer from possession in one state of property recently stolen in another state that the possessors were parties to the transportation of the property as principals or abettors. Indeed, possession of stolen goods has long been recognized to be some evidence that the possessor was the thief. 1 Wigmore, Evidence § 152 (3d ed. 1940). The bonds were stolen within the preceding period of three to five months, and in one case apparently within two months. Further, there was testimony that the appellants had received the bonds from friends in New York City. Testo testified that Coppola told him he was going to obtain the bonds from friends in New York City (Tr. 557, 628-9), and that appellants told him that the bonds came from friends "in the City" and friends "down the line" (Tr. 575, 631).

As we indicated in *United States* vs. *DeSisto*, 329 F.2d 929 (2d Cir. 1964), the possession of recently stolen goods supports an inference not merely of guilty knowledge but of participation in the theft. DeSisto had been found with several cartons of stolen goods five days after the actual theft, and the court rejected his argument that the only inference that could

be drawn from the possession of recently stolen goods is guilty knowledge and not participation in the theft. See *McNamara* vs. *Henckel*, 226 U.S. 520 (1913). In *Boehm* vs. *United States*, 271 Fed. 545 (2d Cir. 1921) the jury was permitted to decide whether possession four and nine months after the theft was sufficient to constitute possession of "recently" stolen goods.

Appellants base their argument that the inference was impermissible largely on the language contained in *Leary* vs. *United States*, 395 U.S. 6 (1969) and *Turner* vs. *United States*, — U.S. —, 90 S. Ct. 642 (1970). However, we do not think that these cases support the appellants' argument. Here the inference to be drawn is a factual one rationally supported by common sense and every day experience. In *Leary* the court stressed that the inference had insufficient basis in fact as there was and could be no showing that marihuana was always imported into the United States. See *United States* vs. *Matalon*, slip opinion p. 2205 (2d Cir. 1970) for a discussion of the impact of *Turner* and *Leary* on the statutory presumption that possession of smuggled goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction. Although the test to be applied when judging the constitutionality of a statutory presumption has undergone extensive examination in *Turner* and *Leary*, we are dealing here with a long recognized rule of common law I Wigmore, *supra*, and the cases dealing with statutory inferences are not controlling. In *Matalon*, *supra*, the statute in question, 18 U.S.C. § 545, allowed the jury to infer knowledge of illegal importation irrespective of the length of time elapsing between the date the goods illegally entered this country and the date the goods were found in the defendant's possession. The court indicated that a showing of "recent" illegal

importation would be necessary to support the inference that one possessed of the goods was more likely than not to be aware that the goods had been illegally imported. *United States* vs. *Matalon*, slip op. p. 2210.

We come then to the question of whether the jury was properly instructed regarding the inference, and we find that it was. Judge Timbers charged:

> "This inference of interstate transportation is what the law calls a permissive inference. From the fact of possession in one state of property recently stolen in another state you may infer that the possessor transported the property in interstate commerce; but and this must be absolutely crystal clear to the jury you are not required to draw such an inference. It is entirely up to you whether you do so or not.
>
> Furthermore, in determining whether you will draw the inference here, you should consider, among other things, whether the possession of the stolen property in Connecticut, if you find 'possession' and if you find that the bonds were stolen, was sufficiently 'recent' to warrant your drawing the inference. The term 'recent' or 'recently' is a relative term which has no fact meaning. Whether property may be considered as recently stolen depends upon the nature of the property and the facts and circumstances shown by the evidence. Obviously the longer the period of time since the theft, the less justification there is for drawing the inference."

The trial judge properly stressed the fact that the possession must be of recently stolen goods, and in several places emphasized that the appellants did not have the burden of proving or explaining possession, saying at one point: "I hasten to add that no defendant has any burden of explaining his possession,

if you find that defendants were possessed of the bonds." It was made abundantly clear to the jury that it was their decision whether or not to apply the inference and that they should only apply the inference if possession was sufficiently "recent" to justify its application.

The appellants' second point challenges the sufficiency of the evidence to prove the charge of conspiring to transport the stolen bonds out of Connecticut. We find that the evidence was not sufficient to support the charge of conspiracy. Accordingly, we reverse the convictions of both appellants on this count. A review of the evidence points up the inadequacies of the government's position.

The government proved that on March 8, 1967, Testo pledged four bonds with a face value of $20,000. The bonds, each for $5,000, were a Turnpike Authority of Kentucky bond due July 1, 2002, two Commonwealth of Puerto Rico bonds due July 1, 1970, and a Dormitory Authority of New York bond due July 1, 1994, all redeemable upon maturity at various locations outside of Connecticut. The government also introduced evidence showing that Testo was in dire financial straits and that Coppola was aware of the extent of Testo's difficulties. The government argues that from these facts the inference may be drawn that Coppola and Connelly were aware that at some future time the bonds might be expected to become a part of interstate commerce.

The government relies on *United States* vs. *Mattia*, 379 F.2d 725 (3rd Cir. 1967) for support of its argument, but in that case, the defendants in New Jersey had themselves counterfeited General Motors Acceptance Corporation Bonds with a redemption provision in New York. In the present case, how-

ever, the inference is significantly more tenuous for one must infer not only that the defendants foresaw Testo would default on the bonds, but also that they foresaw the bonds would be redeemed outside of the State of Connecticut. The pledged bonds were due in 1970, 1994, and 2002, and rather than their being redeemed out of Connecticut at some far distant time, the greater likelihood is that the bank would sell the pledged bonds on default, an action which could easily have taken place in Connecticut. If the government's theory were to prevail, every disposal of a stolen bond, with a redemption provision out of state, would also constitute a conspiracy to transport the bond out of the state. This result would strain the language of the statute and would in effect, be giving duplicate punishments for what is in essence but a single crime.

We have considered the other points raised by appellants and find them without merit. The convictions on counts one and two of indictment #11932 are affirmed and the conviction on count one of indictment #12085 is reversed. As the sentences imposed were well within the limits applicable to the convictions under the first indictment, our reversal of the conviction for conspiracy does not require a remand for resentence of the defendants.

SUPREME COURT, U. S.

No. 352

In the Supreme Court of the United States

October Term, 1939

JOHN W. CONNELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 352

JOHN W. CONNELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is a co-defendant of Gennaro J. Coppola, whose petition for a writ of certiorari (No. 1638, O.T., 1969) was denied on June 29, 1970. Petitioner was convicted following a jury trial in the District of Connecticut under two counts of an indictment, charging the interstate transportation of and the pledging of stolen bonds, in violation of 18 U.S.C. 2314 and 2315. Petitioner was sentenced to imprisonment for five years and fined $5,000 on each count, the terms of imprisonment to run concurrently. The court of appeals affirmed this conviction (424 F. 2d 991) and denied rehearing.

The evidence is summarized in our brief in opposi-

400-626—70

tion in *Coppola* (No. 1638, O.T., 1969) and in the opinion below (Pet. App. 4a–11a). Briefly, it showed that the stolen bonds were delivered in Connecticut to Testo, a financially troubled merchant, by co-defendant Coppola. Petitioner Connelly was present on at least four occasions when Testo and Coppola met and was a participant in a discussion when Testo was told that the bonds would come from a friend "down the line." Coppola introduced petitioner to Testo as his partner (Pet. 7; Pet. App. 6a).

As we pointed out in our brief in opposition in *Coppola* (No. 1638, O.T., 1969), a jury could properly find from the fact of possession of the bonds in Connecticut a short time after they had been stolen in New York that the possessor knew they had been stolen and that he either transported or aided and abetted their transportation from New York to Connecticut.

Petitioner also contends that the reversal of the conspiracy count rendered inadmissible some of the evidence admitted at trial on the substantive counts. However, it is well settled that the admissibility of such evidence rests on basic principles of agency and not on the presence of a conspiracy count. See, *e.g.*, *United States* v. *Gruzello*, 365 F. 2d 990, 995 (C.A. 2); *United States* v. *Olweiss*, 138 F. 2d 798, 799–800 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

August 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970